

Copyright 2012 by Northwestern University School of Law
Northwestern University Law Review

Printed in U.S.A.
Vol. 106, No. 2

ARE EVEN UNANIMOUS DECISIONS IN THE UNITED STATES SUPREME COURT IDEOLOGICAL?[†]

Lee Epstein, William M. Landes & Richard A. Posner

ABSTRACT—The fact that a substantial percentage of Supreme Court decisions are unanimous is often used to undermine the theory that the Court's decisions are ideologically driven. We argue that if the ideological stakes in a case are small, even slight dissent aversion is likely to produce a unanimous decision. The data support this interpretation but also establish the existence of an ideological effect in unanimous decisions. These findings are consistent with a realistic conception of the Court as a mixed ideological–legalistic judicial institution.

AUTHORS—Professor Epstein thanks the National Science Foundation for research support. Professor Landes and Judge Posner thank the John M. Olin Foundation and the law and economics program at the University of Chicago Law School for research support.

[†] This Essay, prepared for the symposium on the legacy of Justice Stevens that was held at Northwestern University School of Law on May 12, 2011, is excerpted (with minor changes) from the authors' forthcoming book. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (forthcoming Nov. 2012).

The Supreme Court is widely regarded, and not only by political scientists, as a highly political Court, an impression often reinforced by the ferocious dissents of one or more Justices in many cases. This makes the Court's unanimous decisions an important subject for study—for how is unanimity achieved in a political court?—and it is a subject that has been neglected.¹ This Essay seeks to advance understanding of the phenomenon of Supreme Court unanimity. Despite the title of the symposium, this is not an essay about Justice Stevens as such, but it is not irrelevant to his service on the Court. He was noted for frequent dissents.² Of the Justices who served in the 2005 through 2009 Terms³ (the years of the Roberts Court before Justice Stevens retired), he had the highest dissent rate—30.3% of the 320 cases in which he participated (Justice Souter was second, at 27.2%—69/254).⁴ Yet he voted more often to join a unanimous decision than he voted to dissent—39.1% of the votes he cast were in unanimous decisions (125/320). Whether this should be thought paradoxical is one of the questions we try to answer in this Essay.

The Supreme Court Database (also known as the Spaeth Database) contains data on cases decided since the 1946 Term (the last Term we study is the 2009 Term). We define unanimous decisions as ones in which no Justice dissented, even if there were also one or more concurring opinions. Concurring opinions are actually more common in unanimous decisions than in non-unanimous ones—41% of the unanimous decisions in The Supreme Court Database include concurring opinions, compared to 38% for non-unanimous decisions—although the reason may be arithmetical: in a 5–4 decision, the maximum number of concurring opinions is four; in a 9–0 decision it is eight. An alternative definition of a unanimous decision—which would be more realistic in recognizing that concurring opinions often indicate disagreement with, rather than merely supplementation or extension of, the majority opinion—would be a decision in which all the

¹ But see Saul Brenner & Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75 (1987); Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129 (2012); Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387 (1998); Pamela C. Corley, Amy Steigerwalt & Artemus Ward, *Deciding To Agree: Explaining Consensual Behavior on the United States Supreme Court* (Apr. 3–6, 2008) (unpublished manuscript presented at the Annual Meeting of the Midwest Political Science Association), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/6/6/1/1/pages266111/p266111-1.php.

² See, e.g., Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157, 157 (Earl M. Maltz ed. 2003) (referring to Justice Stevens as the “Court’s leading dissenter”); Jeffrey A. Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50, 52.

³ Excluding Justice O’Connor, who retired in January 2006.

⁴ These percentages exclude cases in which one or more Justices did not sit. The source of our statistics, unless otherwise indicated, is THE SUPREME COURT DATABASE, <http://www.supremecourtdatabase.org> (last visited May 29, 2012), sometimes called the “Spaeth database.”

Justices joined the majority opinion, whether or not any of them also wrote a concurring opinion. We have not broken down the data sufficiently to enable us to analyze unanimous decisions so defined.

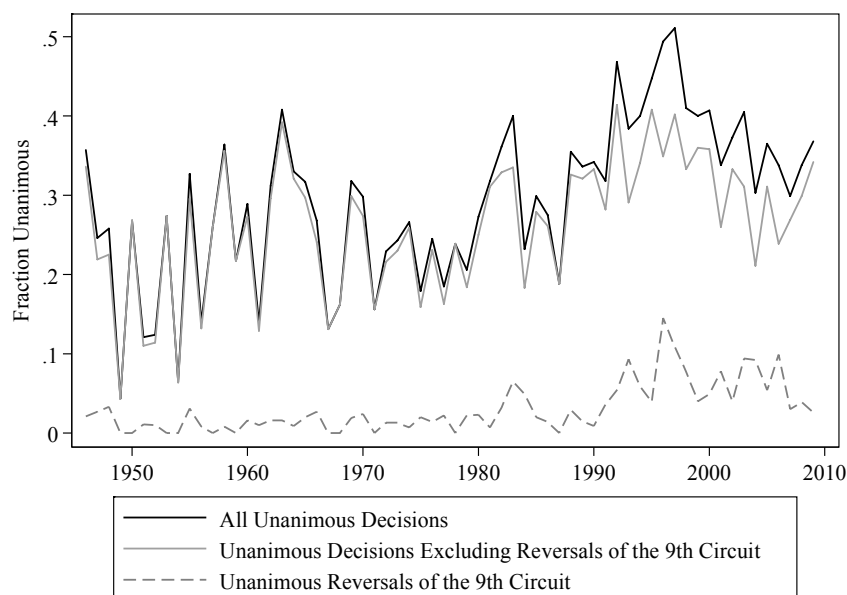
Except in the 1969 Term, in which there were only eight Justices, we exclude unanimous cases in which one or more Justice was absent; the reason is that we cannot be certain that if a ninth Justice had sat, the case would still have been decided unanimously.

Under our definition, about 30% of the Court's orally argued decisions from 1946–2009 were decided unanimously. Figure 1 shows that the percentage has been trending upward: from 21% in 1946–1952 (the Vinson Court) to 34% since 2005 (the Roberts Court). The graph shows that part of the upward trend is the result of an increasing fraction of unanimous decisions reversing the Ninth Circuit.⁵ Over the entire period, about 73% of Ninth Circuit decisions that the Supreme Court reviewed were reversed unanimously, compared to 63% for the other circuits. If we exclude them, the upward trend falls from 1.35% to 1.07% per year.⁶ Even if the decisions reversing the Ninth Circuit are included, there is no significant positive trend over the last twenty-five years (since Rehnquist's first Term as Chief Justice). The percentage peaked in 1997 at 51.1% (40.2% if excluding Ninth Circuit reversals) and has since declined to 37%.

⁵ Between the 1946 and 2009 Terms, about 73% of decisions by the Ninth Circuit that the Supreme Court reviewed were reversed unanimously, compared to 63% for the other circuits. On the "rogue" character of the Ninth Circuit, see Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000).

⁶ We regressed the logarithm of the percentage of unanimous decisions (with and without unanimous reversals of the Ninth Circuit) against time. The coefficients (and t-ratios) were .014 (5.23) and .011 (4.20) and were significantly different from each other.

FIGURE 1: FRACTION OF UNANIMOUS DECISIONS, 1946–2009 TERMS



Because of the Supreme Court's ideological divisions, the percentage of unanimous decisions might seem inexplicable unless Supreme Court Justices have strong dissent aversion, which they used to,⁷ but no longer do.⁸ Another explanation is that unanimous decisions are limited to cases that do not present ideological issues. A third possible explanation combines the first two: the ideological stakes are small in cases that are candidates for being decided unanimously, so even slight dissent aversion will generate a unanimous decision in cases in which the ideological stakes are low. A fourth explanation, which seems the most plausible, adds to the third that when the ideological stakes are small, a combination of dissent aversion with legalistic commitments is likely to override the ideological preferences of the Justices.⁹ Supreme Court Justices are not plausibly regarded as completely indifferent to such legalistic norms as *stare decisis*; a rampant disregard of precedent would unsettle the law and reduce the

⁷ See Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

⁸ See EPSTEIN ET AL., *supra* note †, ch. 6.

⁹ We derive this explanation from two papers. See Edelman, Klein & Lindquist, *supra* note 1; Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008).

authority of the Justices by making them seem just politicians in robes.¹⁰ (This doesn't necessarily mean they "believe" these norms in some strong sense; they may just find them useful.) We predict, therefore, that few decisions overruling precedents will be unanimous (though *Brown v. Board of Education*¹¹ is a famous example of such unanimity) because it would require a strong ideological conviction to override a commitment to stare decisis.¹²

This prediction is supported by Table 1, which compares the number of unanimous and non-unanimous Supreme Court decisions that "formally alter" a Supreme Court precedent. The data come from the Spaeth (U.S. Supreme Court) database; decisions are coded as formally altering precedent if they state that they are overruling a decision or use equivalent language such as that the decision is "disapproved" or is "no longer good law."

TABLE 1: FORMAL PRECEDENT ALTERATION BY SUPREME COURT, 1946–2009

Alters/Does Not Alter Precedent	Unanimous Cases	Percent Unanimous Cases	Non-unanimous Cases	Percent Non-unanimous Cases
Alters Precedent	33	1.6	106	2.4
Doesn't Alter Precedent	2017	98.4	4382	97.6
Total	2050	100.0	4488	100.0

Unanimous/ Non-unanimous	Precedent Alteration		No Precedent Alteration	
	No. Cases	Percent	No. Cases	Percent
Unanimous	33	23.7	2017	31.5
Non-unanimous	106	76.3	4382	68.5
Total Cases	139	100.0	6399	100.0
Note: Cells include only cases in which all nine Justices voted, except in the 1968 Term, when there were only eight participating Justices.				

Notice that only 1.6% of unanimous cases alter precedent, while 2.4% of non-unanimous ones do. Another way to see the difference is that 23.7% of cases in which precedent is altered are unanimous, whereas 31.5% of cases in which precedent is not altered are unanimous.

¹⁰ See Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021–22 (1996).

¹¹ 347 U.S. 483 (1954).

¹² The articles cited *supra* note 9 also find that "disordered voting" (voting against the ideological grain) is unlikely in cases that overrule decisions of the Court.

We can derive additional indirect evidence of the ideological stakes in unanimous Supreme Court decisions from the nature of the case (such as whether it is a civil liberties case or a tax case) and from the presence or absence of a dissent in the lower court. To this end we estimate the following regression equation for the probability of a unanimous decision (P_u):

$$P_u = f(\text{Dissent}, \text{Reversal}, \text{CA-Conflict}, \text{Other-Conflict}, \text{Non-Ideological}, \text{Ninth Circuit}, \text{Chief}, \text{Subject Area}, u)$$

where *Dissent* = 1 if the Supreme Court's opinion notes that there was a dissent in the court below (*Dissent* = 0 otherwise),¹³ *Reversal* = 1 if the Supreme Court reversed the lower court, *CA-Conflict* = 1 if the Court mentioned a conflict among federal courts of appeals on the issue on which the Supreme Court granted certiorari, *Other-Conflict* = 1 if there was a conflict between other courts or between a federal court (or courts) of appeals and a state court or courts,¹⁴ *Non-Ideological* = 1 if the ideological direction of the Supreme Court decision could not be specified, and *Ninth Circuit* = 1 if the case came from the Ninth Circuit. *Chief* is a set of dummy variables for the Terms of the five Chief Justices in our sample (Chief Justices Vinson, Warren, Burger, Rehnquist, and Roberts, with Chief Justice Vinson as the omitted variable), *Subject Area* comprises separate dummy variables for civil liberties, economics, and judicial power cases (the omitted category, which accounts for fewer than 6% of our sample cases, consists mainly of federalism cases). Table 2 lists the variables (and their means) in the regressions.

¹³ The *Dissent* variable in THE SUPREME COURT DATABASE represents whether the majority opinion mentions that there was a dissent in the lower court. Generally it does, especially when reversing, and most decisions by the Supreme Court are reversals. Still, we are probably underestimating the number of lower court opinions in which there was a dissent.

¹⁴ 1336 (87%) of the 1535 conflict cases involve conflicts among the courts of appeals. We exclude cases from the Federal Circuit. The remaining 199 cases mainly involve conflicts between a federal court and a state court or between state courts.

TABLE 2: VARIABLES IN REGRESSIONS ON UNANIMOUS DECISIONS, 1946–2009 TERMS

Variables	Mean (Standard Deviation)	
	All	Unanimous Only
<i>Unanimous Decision</i> : coded 1 (yes) or 0 (no)	0.29 (0.45)	-
<i>Direction</i> : Ideological direction of Supreme Court decision, coded 1 (conservative) or 0 (liberal)	0.49 (0.50)	0.42 (0.49)
<i>Dissent</i> : Dissent in court below, coded 1 (yes) or 0 (no)	0.22 (0.42)	0.20 (0.40)
<i>Reversal</i> : Reversal of court below, coded 1 (yes) or 0 (no)	0.63 (0.48)	0.66 (0.47)
<i>CA-Conflict</i> : Conflict among federal appellate courts, coded 1 (yes) or 0 (no)	0.22 (0.42)	0.27 (0.45)
<i>Other-Conflict</i> : Conflict among federal and state courts or among state courts, coded 1 (yes) or 0 (no)	0.03 (0.18)	0.04 (0.19)
<i>Lower Court Direction</i> : Ideological direction of the lower court decision, coded 1 (conservative) or 0 (liberal)	0.56 (0.50)	0.57 (0.50)
<i>Non-Ideological</i> : Ideological direction of Supreme Court decision unspecifiable, coded 1 (yes) or 0 (no)	0.01 (0.10)	0.01 (0.12)
<i>Ninth Circuit</i> : Case from Ninth Circuit, coded 1 (yes) or 0 (no)	0.11 (0.32)	0.15 (0.36)
<i>Segal–Cover Median</i> : Ideology of the Court’s median each Term (calculated using Segal & Cover’s editorial scores)	0.52 (0.23)	0.55 (0.22)
<i>Fraction Republican</i> : Fraction of Justices appointed by a Republican President	0.59 (0.26)	0.63 (0.25)
<i>Civil Liberties</i> : (Adjusted) Civil liberties case, coded 1 (yes) or 0 (no). Includes criminal procedure, civil rights, first amendment, due process, attorney, and privacy	0.51 (0.50)	0.44 (0.50)
<i>Economics</i> : Economics case, coded 1 (yes) or 0 (no). Includes economic activity, union, and tax cases	0.30 (0.46)	0.31 (0.46)
<i>Judicial Power</i> : Judicial power case, coded 1 (yes) or 0 (no)	0.13 (0.34)	0.19 (0.39)
<i>Federalism</i> : Federalism case, coded 1 (yes) or 0 (no)	0.05 (0.23)	0.05 (0.22)
<i>Number of observations</i>	7184	1728
<i>Notes:</i> (1) All regressions are limited to orally argued cases. (2) There are only 6020 observations in the regression that include the conflict variables because no information on conflicts is available for the remaining 1164 decisions.		

We predict a negative coefficient on the *Dissent* variable and positive coefficients on the *Reversal*, *CA-Conflict*, and *Non-Ideological* variables. A dissent in the lower court suggests that the case probably has significant ideological stakes; if the stakes had been insignificant, the lower court probably would have been unanimous (even if the panel was ideologically mixed), owing to the strong dissent aversion that we also find in the federal courts of appeals.¹⁵ But we have not studied dissent aversion in state supreme courts,¹⁶ and many U.S. Supreme Court decisions are decisions on appeal from such courts.

A unanimous decision is also more likely when the Court reverses rather than affirms, because some reversals are motivated just by error correction—to keep the lower courts in line on what may be technical issues with slight or no ideological stakes. The Court would have little reason to affirm a case involving a technical issue that the court of appeals had decided correctly unless there was an intercircuit conflict (*CA-Conflict*). The Court feels some obligation to resolve such conflicts even if they do not present challenging issues—which are issues that are likely to be ideologically charged—and so neither affirmances nor reversals in intercircuit conflict cases are as likely to be ideologically motivated as other Supreme Court decisions. Conflicts represented by the *Other-Conflict* variable are less likely to involve technical issues, so we expect this variable to have a weaker effect on the likelihood of a unanimous decision than the *CA-Conflict* variable.

Slightly more than one percent of the cases in our sample (75 out of 7184) could not be classified as either conservative or liberal, suggesting that ideological issues were not salient; so we expect those cases to be disproportionately decided unanimously.

We expect a positive coefficient on the *Ninth Circuit* variable because of the large number of unanimous reversals of Ninth Circuit cases. And since ideology is expected to play a larger role in civil liberties cases than in the other subject matter areas, we predict a negative relation between the civil liberties variable and the likelihood of a unanimous decision, and likewise in the judicial power category, which includes cases involving standing, mootness, comity, review of federal administrative agency decisions, the act of state doctrine, and other subject areas in which often there are ideological stakes, though smaller ones than in civil liberties cases.

The positive trend in the fraction of unanimous decisions should yield positive coefficients on the *Chief* dummy variables (since Chief Justice Vinson, who was Chief Justice when the unanimity rate was lowest, is the omitted *Chief* variable). The effect should be largest for the Rehnquist and

¹⁵ See EPSTEIN ET AL., *supra* note †, ch. 6.

¹⁶ A recent study estimates that there is at least one dissent in about 22% of all state supreme court decisions. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1482 (2009).

Roberts Courts in view of the sharp increase in the fraction of unanimous decisions in the last twenty-five years.¹⁷

The regression results in Table 3 support most of our predictions.¹⁸ *Dissent* has a negative and highly significant effect in both equations. A lower court dissent produces a .068 decline in the probability of a unanimous decision (that is, a 23% decline relative to the mean probability of a unanimous decision, .29, when there is no dissent). Both *Reversal* and *CA-Conflict* have positive and highly significant effects on unanimity; a reversal and a conflict in the lower courts raise the probability of a unanimous decision by .054 and .057 respectively (19% and 20% relative to the mean of .285). *Other-Conflict* is not significant, which is not surprising since we have no information on whether other conflicts involve non-ideological issues. *Non-Ideological* and *Ninth Circuit* are also not significant.

The predicted probability of a unanimous decision is lower in civil liberties cases than in judicial power cases (21% and 36%, respectively), as is to be expected, since civil liberties is a more ideologically charged field. In addition, cases are more likely to be decided unanimously by both the Rehnquist and Roberts Courts than by the Burger, Warren, or Vinson Courts.

¹⁷ We experimented with two other variables: a rough measure of ideological uniformity of the Court each Term and the Court's caseload. Neither was close to being statistically significant and neither affected the magnitude or significance of the other variables.

¹⁸ Equations (1) and (2) are nearly identical, except that (2) includes the two conflict variables and contains fewer observations (6020 instead of 7184). The information on lower court conflicts is based on the reasons the majority opinion gave for granting certiorari. In 1164 cases no reason was given.

TABLE 3: LOGIT ANALYSIS OF THE PROBABILITY OF A UNANIMOUS DECISION, 1946–2009
TERMS

Equation	Probability of Unanimous Decision	
	(1)	(2)
<i>Dissent</i>	-0.068** (4.86)	-0.066** (4.22)
<i>Reversal</i>	0.054** (4.39)	0.059** (4.45)
<i>CA-Conflict</i>	-	0.057** (4.48)
<i>Other-Conflict</i>	-	0.049 (1.35)
<i>Non-Ideological</i>	0.042 (0.99)	0.085 (1.19)
<i>Ninth Circuit</i>	0.016 (0.95)	0.016 (0.92)
<i>Warren Court (1953–1968)</i>	0.044 (0.81)	0.048 (0.84)
<i>Burger Court (1969–1985)</i>	0.066 (1.32)	0.065 (1.28)
<i>Rehnquist Court (1986–2004)</i>	0.166** (3.33)	0.158** (3.15)
<i>Roberts Court (2005–2009)</i>	0.139** (2.93)	0.130** (2.74)
<i>Civil Liberties</i>	-0.082** (3.45)	-0.104** (3.68)
<i>Economics</i>	-0.023 (0.90)	-0.050 (1.67)
<i>Judicial Power</i>	0.076** (2.71)	0.061 (1.88)
Number of Observations	7184	6020
<i>Notes:</i> (1) * $p \leq .05$, ** $p \leq .01$. (2) The entries are marginal-effect coefficients at the mean values of all variables. (3) <i>Federalism</i> (and <i>Miscellaneous</i>) is the omitted case category. (4) Standard errors are adjusted by clustering on Term of Court (64 clusters, 1 for each Term).		

If we add a dummy variable for whether the case was decided in a per curiam opinion rather than a signed opinion, the positive coefficient on the judicial power variable is no longer statistically significant. A

disproportionate number of judicial power cases are decided per curiam—23%, versus only 5% for all other subject areas (on average), and per curiam decisions, even in orally argued cases (for our sample is limited to orally argued cases), generally signify a less important or less contentious case than one decided in a signed opinion. And sometimes a case is dismissed in a per curiam opinion because a jurisdictional flaw was discovered after the case had been argued, so there is no decision on the merits to classify as liberal or conservative.

We also divided the cases into finer subject matter areas. Table 4 lists the fraction of unanimous cases in each area, ranked from highest to lowest.

TABLE 4: MEAN FRACTION OF UNANIMOUS DECISIONS ACROSS FINE SUBJECT AREAS

Subject Area	Mean Fraction	Number of Cases
Interstate Relations	0.41	56
Judicial Power	0.41	943
Federalism	0.33	336
Attorneys	0.31	81
Unions	0.29	332
Economic Activity	0.29	1504
Civil Rights	0.29	1124
Privacy	0.28	90
Federal Taxation	0.28	290
Due Process	0.26	301
Criminal Procedure	0.20	1539
First Amendment	0.20	563
Notes:		
(1) We excluded the Miscellaneous category because it contained only 17 cases.		
(2) The total number of cases is 7159.		

The four classes with fractions below the mean of .285—due process, criminal procedure, First Amendment, and privacy—are ideologically charged, but so are some of the classes with fractions at or above the mean, such as civil rights, unions, and federalism.

We suggested earlier that if the ideological stakes in a case are small, even slight dissent aversion is likely to produce a unanimous decision. But the outcomes might still be correlated with the Court's overall ideology. We test that hypothesis using two measures of ideology: the fraction of Justices appointed by Republican Presidents and the Justices' median Segal–Cover scores.¹⁹

¹⁹ Segal–Cover scores are estimates of a Supreme Court Justice's ideology at the time of his appointment. See Lee Epstein & Jeffrey A. Segal, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 111–12 (2005); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–61 (1989), updated in Jeffrey A. Segal,

Since the petitioner wins about 66% of the unanimous cases, we expect a negative coefficient on the variable denoting the ideological direction of the lower court decision; this is a high rate of reversals (though similar to the reversal rate for non-unanimous decisions) and we expect reversals to be heavily influenced by ideology because the Supreme Court has neither the time nor the inclination to correct merely technical errors by the lower courts. Testing this hypothesis requires estimating separate regressions for unanimous decisions in which there is, and unanimous decisions in which there is not, a lower court conflict; for if there is a conflict that the Supreme Court wants to resolve it is immaterial which side of the conflict the lower court was on.

Table 5 presents the results of the regression analysis. The ideological direction of the lower court decision is highly significant in regressions (1) and (2). And the effects are large. For example, a conservative (liberal) lower court decision reduces (increases) the probability of a conservative unanimous Supreme Court decision by between 0.42 and 0.44, holding the other variables constant.

Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813–15 (1995). Martin–Quinn scores are estimates of a Supreme Court Justice’s ideology as inferred from her judicial votes as a Supreme Court Justice. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–52 (2002); Andrew D. Martin & Kevin M. Quinn, Can Ideal Point Estimates be Used as Explanatory Variables? 1–2 (Oct. 8, 2005) (unpublished working paper), available at <http://adm.wustl.edu/media/working/resnote.pdf>.

We experimented with two other measures of the court’s overall ideology—the median Justice Martin–Quinn score and the fraction of Justices who identified themselves as Republicans when they were appointed (this fraction was identical to the fraction appointed by a Republican President in the 1990 to 2008 Terms but not the 1958 to 1989 Terms—for example, Justice Powell, appointed by Nixon, was a Democrat). These substitutions had only minor effects on the regressions.

TABLE 5: LOGIT ANALYSIS OF THE IDEOLOGICAL DIRECTION OF UNANIMOUS DECISIONS, 1946–2009 TERMS

Variables	Fraction Conservative Votes		Fraction Conservative Votes	
	No Conflict in Lower Courts		Conflict in Lower Courts	
Equation	(1)	(2)	(3)	(4)
<i>Ideological Direction of Lower Court Decisions</i>	-0.441** (10.92)	- 0.417** (10.38)	-	-
<i>Fraction Republican</i>	0.138 (1.70)	-	0.236* (2.05)	-
<i>Segal–Cover Median</i>	-	0.339** (4.00)	-	0.465** (3.41)
<i>Ninth Circuit</i>	0.124* (2.51)	0.115* (2.28)	0.082 (1.36)	0.077 (1.28)
<i>Civil Liberties</i>	0.094 (1.33)	0.092 (1.31)	-0.036 (0.32)	-0.057 (0.50)
<i>Economics</i>	0.042 (0.60)	0.042 (0.62)	-0.139 (1.43)	-0.141 (1.41)
<i>Judicial Power</i>	0.502** (6.87)	0.500** (6.78)	0.034 (0.32)	0.023 (0.21)
Number of Observations	1189	1189	539	539
<i>Notes:</i> (1) $*p \leq .05$, $**p \leq .01$. (2) The entries are marginal-effect coefficients at the mean values of all variables. (3) Federalism (and Miscellaneous) is again the omitted case category. (4) The ideological direction of the 1189 9–0 decisions (8–0 for the 1969 Term) is coded: 0 = liberal; 1 = conservative. (5) Standard errors are clustered by Term of Court (64 clusters, 1 for each Term).				

The coefficients on the two ideological measures (*Fraction Republican* and *Segal–Cover Median*) are positive, but the first is not statistically significant, and both have only small effects. The coefficients imply that a decline in the number of appointees of a Republican President from five to four would decrease the fraction of conservative unanimous decisions by between .015 (in equation (1), which holds constant the ideological direction of the lower court decision) and .026 (in equation (3), which is limited to cases in which there was a conflict in the lower courts). Neither effect is large relative to the .41 fraction of unanimous Supreme Court decisions that are conservative. But the predicted effects would be much larger if a Court consisting of eight Justices appointed by Republican presidents and one appointed by a Democratic president switched to eight Democratic appointees and one Republican appointee. That would reduce

the probability of a conservative unanimous decision by between .11 and .19 (27% and 46%, respectively, relative to the mean of .41).

When we substitute the median Segal–Cover scores for the *Fraction Republican* variable, the coefficients on the Court’s ideology are more significant. Even though Segal–Cover scores are based on newspaper editorials prior to confirmation, they avoid the obvious errors of classifying Justices Brennan, Stevens, and Souter as conservative Justices just because Republican Presidents appointed them.

Of the remaining variables in Table 5, cases from the Ninth Circuit are significantly more likely to be decided conservatively, holding constant the ideological direction of the Ninth Circuit decision. This effect, however, is not significant when there is a conflict in the lower courts (equations (3) and (4)); this is consistent with our distinction between conflict and nonconflict cases. The subject matter variables are generally not significant except for the increase in the probability of a conservative decision in judicial power cases in equations (1) and (2) but not (3) and (4).

In short, ideology plays a small but still significant role in unanimous decisions. This is consistent with our theory and with the indirect evidence presented in Table 5 that decisions are unanimous when the ideological stakes are not large enough to lead a Justice who disagrees with the majority to dissent.

Table 6 supplements the analysis by presenting some voting characteristics of the current Justices, plus Justice Souter, who was appointed in the same general period as Justices Thomas, Ginsburg, and Breyer; we exclude Justices Stevens and O’Connor, who were appointed much earlier. The liberal Justices, plus Justice Thomas, have the highest combined percentage of votes for unanimous decisions and dissenting votes. The implication (ignoring Justice Thomas, an outlier in many respects) is that liberals are more inclined to join decisions that do not present significant ideological stakes, and more inclined to dissent in cases that do present such stakes because the Court is predominantly conservative; this may explain Justice Stevens’s voting pattern noted at the beginning of this Essay.

Justice Kennedy, the swing Justice, gets his way most of the time: he dissents the least among the Justices and writes or joins concurring opinions rarely. Justice Scalia—arguably the Court’s intellectual leader—writes or joins concurring opinions the most. Justice Roberts is the second-least-frequent dissenter, and writes or joins the fewest concurring opinions, perhaps in order to signal that as Chief Justice he usually gets his way or that he seeks, by his example, to promote consensus.

TABLE 6: VOTES BY RECENTLY APPOINTED JUSTICES (BEGINNING WITH JUSTICE SOUTER)

Name	Percentage of Justice's Votes Cast in Unanimous Decisions	Percentage of Justice's Dissenting Votes in All Cases	Percentage of Justice's Concurring Votes in All Cases	Percentage of Justice's Concurring Votes in Unanimous Decisions
Alito	0.374	0.159	0.123	0.124
Breyer	0.421	0.207	0.118	0.112
Ginsburg	0.420	0.217	0.098	0.111
Kennedy	0.413	0.097	0.096	0.077
Roberts	0.391	0.122	0.063	0.056
Scalia	0.405	0.178	0.155	0.164
Sotomayor	0.424	0.227	0.106	0.107
Souter	0.419	0.182	0.094	0.109
Thomas	0.421	0.202	0.144	0.148

To conclude, this Essay has established the existence of an ideology effect in unanimous decisions, but a weaker one than in non-unanimous decisions, of the Supreme Court. These findings are consistent with a realistic conception of the Court as a mixed ideological–legalistic judicial institution.

